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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

JACLYN SANTOMENNO; KAREN	)	Case No. CV 12-02782 DDP (MANx)
POLEY; BARBARA POLEY,	)	
	)	<b>ORDER DENYING DEFENDANTS' MOTION</b>
Plaintiffs,	)	<b>TO AMEND</b>
	)	
v.	)	[Dkt. No. 140]
	)	
TRANSAMERICA LIFE INSURANCE	)	
COMPANY; TRANSAMERICA	)	
INVESTMENT MANAGEMENT, LLC;	)	
TRANSAMERICA ASSET	)	
MANAGEMENT INC.,	)	
	)	
Defendants.	)	
	)	
_____	)	

Presently before the court is Defendants Transamerica Life Insurance Company, Transamerica Investment Management, LLC, and Transamerica Asset Management, Inc.'s Motion to Amend the Court's February 19, 2013 Order in Order to Certify for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b). Having considered the parties' submissions and heard oral argument, the court adopts the following order.

Under 28 U.S.C. § 1292(b), a district court may certify an order for interlocutory appeal where the order involves a

1 "controlling question of law as to which there is a substantial  
2 ground for difference of opinion" and where "an immediate appeal  
3 from the order may materially advance the ultimate termination of  
4 the litigation." A controlling question is one the resolution of  
5 which "could materially affect the outcome of litigation in the  
6 district court." In re Cement Antitrust Litigation, 673 F.2d 1020,  
7 1026 (9th Cir. 1982). "[N]either § 1292(b)'s literal text nor  
8 controlling precedent requires that the interlocutory appeal have a  
9 final, dispositive effect on the litigation, only that it 'may  
10 materially advance' the litigation." Reese v. BP Exploration  
11 (Alaska) Inc., 643 F.3d 681, 688 (9th Cir. 2011) (quoting 28 U.S.C.  
12 § 1292(b)).

13 In its Order denying in part Defendants' Motion to Dismiss,  
14 the court found that Defendants were fiduciaries with respect to  
15 their fees for several independent reasons. First, the court found  
16 that, given the facts as pleaded in the Complaint, Defendants'  
17 fiduciary duties attached at the time they negotiated their fees,  
18 and therefore they were fiduciaries with respect to those fees.  
19 Second, the court found that by retaining the right to modify their  
20 fees and the investment line-up, Defendants retained sufficient  
21 discretion over their fees to make them fiduciaries with respect to  
22 those fees.

23 Here, Defendants seek to certify the question, "[w]hether a  
24 service provider is a fiduciary with respect to fees charged to an  
25 ERISA plan where the plan's named fiduciary agreed to the fees  
26 before the service provider charged and collected them." (Mot. at  
27 1.) As Defendants concede, this question applies only to the first  
28 of the court's findings regarding Defendants' fiduciary status.

1 Defendants concede that even if the Court of Appeals were to  
2 reverse this court on the first theory of fiduciary duty,  
3 Plaintiffs would be able to proceed on the narrower theory.  
4 Nonetheless, Defendants argue that it is a controlling question  
5 because "such narrower assertions of fiduciary status will involve  
6 a host of plan-specific factual issues requiring discovery and  
7 separate factfinding." (Reply at 7.)

8         The court notes that its "broader" theory of Defendants'  
9 fiduciary status is not as broad as Defendants make out; it is  
10 based on the specific allegations in the Complaint. These  
11 allegations are known to the parties and need not be restated. The  
12 court also believes it worth restating that nothing in the February  
13 19 Order is intended to imply that Defendants are precluded from  
14 charging fees that are consistent with those charged by service  
15 providers in general. Order at 13 ("TLIC is entitled to reasonable  
16 fees and profits for the services that it provides to the plans,  
17 but as a fiduciary TLIC is accountable for the reasonableness of  
18 those fees.").

19         In short, whether Defendants' fiduciary duty is considered to  
20 attach at the time of the negotiations of the contracts or by  
21 virtue of the discretion retained in the contract, preparation for  
22 certification motions will require a largely similar scope of  
23 discovery. Thus, it does not appear that certifying the question  
24 would materially advance the litigation.

25         While it may be the case that a substantial ground for  
26 difference of opinion exists with respect to certain aspects of  
27 this court's Order denying in part Defendants' motion to dismiss,  
28 it is not clear that resolving the question posed by the Defendants

1 would materially advance the litigation. The court therefore DENIES  
2 the Motion to Amend.

3 IT IS SO ORDERED.

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6 Dated: April 25, 2013

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DEAN D. PREGERSON  
United States District Judge